

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
COMMONWEALTH

: No. CP-41-CR-0001020-2019
: CP-41-CR-0001473-2016

vs.

:
:
:
:

COLIN J. BEST,
Appellant

: 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This Opinion is written in support of the court’s Opinion and Order entered on February 18, 2021, which dismissed as untimely the petitions for return of property filed by Appellant.

By way of background, in CR-1473-2016, the Commonwealth filed a criminal complaint against Appellant on August 4, 2016. The charges related to videos or images that allegedly were discovered on electronic devices utilized by Appellant.

On April 29, 2019, Appellant, through counsel, filed a motion to dismiss the charges pursuant to Rule 600. On May 8, 2019, the court granted Appellant’s motion. The Commonwealth sought reconsideration, which the court denied on May 30, 2019. The Commonwealth appealed to the Pennsylvania Superior Court. On December 26, 2019, the Pennsylvania Superior Court dismissed the Commonwealth’s appeal for failure to file a brief. The record was remitted on February 4, 2020.

On or about October 2, 2020, Appellant signed his motion for return of property and submitted it to prison authorities for mailing. This motion seeks the return of a black iPhone 6s Plus and a rose gold colored iPhone 6s Plus. The clerk of courts filed Appellant’s motion on October 7, 2020.

On October 8, 2020, the Commonwealth filed an answer and new matter in which it asserted that, pursuant to *Allen*,¹ the court lacked jurisdiction to return the property to Appellant because Appellant waived any right to return by failing to file his motion for return of property within 30 days of the disposition of his criminal case.

In CR-1020-2019, on January 23, 2020, Appellant pled guilty to two counts of invasion of privacy and was sentenced. On or about December 11, 2020, he signed and mailed his motion for return of property seeking the return of a black Apple iPhone and a silver Apple iPad. The motion was filed in the Lycoming County Clerk of Courts Office on December 23, 2020.

On February 5, 2021, the court held an argument on Appellant's motions. The court treated Appellant's motions as filed on the date that Appellant signed and mailed them pursuant to the prisoner mailbox rule. Appellant conceded that he did not file his motions within 30 days of the disposition of his charges, but he contended that certain exceptions applied. On February 18, 2021, the court dismissed Appellant's motions pursuant to *Allen*.

Appellant filed a notice of appeal. In his concise statement, Appellant asserted numerous issues.

Appellant first asserts that the trial court "erred by violating section 1921 of the Statutory Construction Act of 1972 (SCA), 1 Pa. C.S. §1921(b) when the court required the Appellant to file a "Return of Property Petition" within (30) days of final disposition, this requirement is not dictated within the statutory construction of Rule 588." Appellant never

¹ *Commonwealth v. Allen*, 107 A.3d 709, 717-18 (Pa. 2014)

raised this issue in the lower court. Therefore, it is waived. Pa. R. A. P. 302 (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”). Moreover, the Statutory Construction Act only applies to statutes. Rule 588 is not a statute; it is a Rule of Criminal Procedure. Therefore, section 1921 does not apply. The Pennsylvania Supreme Court established the 30-day time limit in *Allen*, which is binding precedent on this court.

Appellant also contends that the trial court “erred when dismissing both Petitions as untimely, even when Rule 588 established no mandatory or required timeframe to file said petitions as formally established within several other rules.” Again, the Pennsylvania Supreme Court established the 30-day time limit in *Allen*, which is binding precedent on this court.

Appellant next asserts that if the filing of the petitions were untimely, the trial court “erred by dismissing the Appellant[‘]s Petitions as untimely, after the Commonwealth filed a Response/Answer requesting for [sic] the destruction of the said property. This Response/Answer ultimately waived any untimeliness of the Appellant[‘]s Petition.”

The court could not agree for two reasons. First, the Commonwealth did not file a forfeiture petition in response to Appellant’s motion for return of property. Second, the Commonwealth filed an answer and new matter, specifically raising the untimeliness of Appellant’s motion and the waiver that occurred as a result.

The court also found Appellant’s reliance on *Irland*² was misplaced. *Irland* concerned whether a common law basis for forfeiture of derivative contraband exists in Pennsylvania. In response to *Irland*’s motion for return of property, the Commonwealth filed

a motion seeking forfeiture and destruction of the property based on common law forfeiture. Neither Irland nor the Commonwealth addressed the timeliness of Irland's motion or the trial court's jurisdiction. On appeal before the Pennsylvania Supreme Court, the Pennsylvania District Attorneys Association (PDAA) asserted a waiver argument in a footnote in its amicus curiae (or friend of the court) brief. The majority opinion explained in a footnote that *Allen* did not apply because the Commonwealth responded to the return motion with a forfeiture petition. More specifically, because the Commonwealth filed a forfeiture petition in response to an untimely motion for return of property, it waived the defense of untimeliness or waiver by claiming ownership of the subject property and asking the court to adjudicate the merits of the case.

In his fourth issue, Appellant claims the trial court erred by allowing the Commonwealth's "civil" motion for destruction to be heard simultaneously with Appellant's "criminal" return of property petition both of which are distinctly different. As Appellant never made this objection during the argument held on February 5, 2021 or at any other time before the lower court, this issue is waived. Pa. R. A. P. 302. Furthermore, the Commonwealth did not file a motion for destruction; it filed an answer and new matter in which it asserted Appellant waived his right to seek return of the property by failing to file his motion in a timely manner. Although the Commonwealth did include a sentence asking the court to issue an order to destroy the property and the court directed the parties to be prepared to address the court's authority or ability to do so, the only issue actually addressed on February 5, 2021 was the timeliness of Appellant's motions for return of property.

Appellant next contends the trial court erred by improperly applying the

² *Commonwealth v. Irland*, 193 A.3d 370 (Pa. 2018).

Pennsylvania Rules of Evidence, see Pa. R.E. 101 and 42 Pa. C.S.A. §6802(h) when the court accepted hearsay testimony from William Weber, Martin Wade and Lee Fry, in an attempt to establish a nexus between the alleged criminal activity and the property. No testifying party was involved with any part of the search or seizures of the property or had first-hand knowledge thereof.

First, Appellant waived this issue by failing to raise it in the lower court. Pa. R. A. P. 302. Appellant never lodged an objection at the time any testimony was taken.

Second, this issue lacks merit. The court generally did not take testimony on February 5, 2021. The court heard arguments on the legal issue of whether Appellant waived his right to seek return of the property by failing to file timely motions. The court did ask Detective Weber who currently possessed the items but only so that the court could issue orders directing the preservation of the items. Transcript, 02/05/2021, at 19-20. During the argument, Joseph Ruby represented the Commonwealth. Neither Mr. Wade nor Mr. Fry were present. In fact, Mr. Fry was no longer with the Lycoming County District Attorney's Office, as he left to take a job as a federal prosecutor in Texas sometime after Appellant entered his guilty plea in case 1020-2019.

In response to Appellant's contentions that photographs of his child were on the devices and his requests to limit the "scrubbing" of the devices, the court asked Detective Weber which devices were associated with a video that was played during a probation violation hearing. Transcript, 02/05/2021, at 22-24. Since Appellant asked that the devices be scrubbed only under court authorization, the court sought clarification regarding which device or devices were associated with videos or images.

In his sixth issue, Appellant contends the trial court "erred by not requiring

the Commonwealth to ever establish the required requisite nexus between the property and alleged criminal activities. While allowing the Commonwealth to continue to use evidence obtained without any valid search or seizure warrants, in violation of both the Pennsylvania Constitution and the 5th, 8th and 14th Amendments of the United States Constitution.” The court cannot agree.

First, Appellant waived this issue by failing to assert it before the trial court during the argument held on February 5, 2021. The court held an argument on February 5, 2021, solely on Appellant’s motions for return of property and the Commonwealth’s answer/response thereto. Second, the argument on February 5, 2021 was not an opportunity for Appellant to attempt to litigate or revive any suppression issues that the court rejected in CR-1473-2016 (see Opinion and Order entered on or about April 6, 2017) or that Appellant waived by pleading guilty in CR-1020-2019. *Commonwealth v. Eiseberg*, 98 A.3d 1268, 1275 (Pa. 2014)(upon the entry of a guilty plea, a defendant waives all claims and defenses other than those sounding in the jurisdiction of the court, the validity of the plea, or the legality of the sentence imposed); *Kessler v. Public Documents Pen Register and Wire Taps*, 180 A.3d 406, 411 n.6 (Pa. Super. 2018)(because Baney pled guilty, he waived any suppression challenge).

Appellant next asserts the trial court erred by violating Appellant’s rights afforded by both the Pennsylvania Constitution Article 1 §13 and the 5th, 8th and 14th Amendments of the United States Constitution when charges on docket number CP-41-CR-1473-2016 were dismissed and a plea was accepted on docket number CP-41-CR-1020-2019 and forfeiture was not part of either disposition nor discussed creating an unknown punishment and/or excessive fine which notice was never given, disclosed nor ordered.

Appellant waived this issue by failing to assert it during the argument held on February 5, 2021. Pa.R.A.P. 302. Furthermore, the court did not order the forfeiture of Appellant's electronic devices. Rather, pursuant to *Allen*, the court held that by failing to file a timely motion for return of property, Appellant waived his right to return of the devices and the court lacked jurisdiction to grant relief to Appellant.

Appellant next asserts that the trial court erred by allowing the Commonwealth to violate rights afforded by both the Pennsylvania Constitution Article 1, §9 and the 5th, 8th and 14th Amendments of the United States Constitution when the Commonwealth deprived Appellant of his property while providing no nexus between the criminal activities and the property.

Appellant waived this issue by failing to assert it in his motion or during the argument held on February 5, 2021. Pa.R.A.P. 302. Furthermore, the court did not allow the Commonwealth to violate Appellant's constitutional rights. Appellant misapprehends the court's role. The court does not act on behalf of the parties. The court rules on motions and issues brought before it by the parties. If Appellant believed that the Commonwealth was violating his constitutional rights, it was incumbent on him to file an appropriate, timely legal document to bring the issue before the court. The court did not seize the property in question nor did it order forfeiture of the property to the Commonwealth. It merely held that it lacked jurisdiction to grant relief to Appellant because Appellant failed to file timely motions for return of property.

Appellant also alleges that the court erred as it was "obligated to restore the status Quo Ante and Order the return of any property that is no longer part of a criminal investigation or needed by the Commonwealth." Appellant waived this issue by failing to

assert it in his motion or during the argument held on February 5, 2021. Pa.R.A.P. 302. The court was not obligated to act on Appellant's behalf. Appellant was obligated to file a timely motion for return of property. Furthermore, the court cannot return the property to Appellant as long as the property contains contraband in the form of obscene material or other inappropriate videos or images. Simply returning the property to Appellant once the criminal case is completed would further harm the victims whose privacy Appellant invaded by surreptitiously photographing or videoing them while in a state of undress.

Appellant next contends that the trial court erred "by not ordering the Commonwealth to either return the seized property or move to timely institute forfeiture proceedings, a violation of due process afforded by both the Pennsylvania and United States Constitutions. Thus after March 29th 2017 suppression hearing where testimony provided show [sic] the Appellant['s] device had nothing of significant [sic] found on it while the other device has an innocent owner (Appellant['s] wife). Regarding CP-41-CR-1473-2016." Appellant waived this issue by failing to assert it in his motion or during the argument held on February 5, 2021. Pa.R.A.P. 302. The court was not obligated to act on Appellant's behalf. Appellant was obligated to file a timely motion for return of property.

In his eleventh issue, Appellant claims the trial court erred when it knowingly, willfully and maliciously allowed the Commonwealth to retain the Appellant's personal property after the Commonwealth testified that it had no criminal relevance while not requiring the Commonwealth to comply with 42 Pa. C.S.A. §6801(c).

Appellant's claims fail for numerous reasons. First, Appellant waived this issue by failing to assert it in his motion or during the argument held on February 5, 2021. Pa.R.A.P. 302. Second, the court was not obligated to act on Appellant's behalf. Appellant

was obligated to file a timely motion for return of property. Third, section 6801(c) was repealed as of July 1, 2017.³ Fourth, the provisions of former section 6801 applied to controlled substance forfeitures. These cases involve neither controlled substances nor petitions for forfeiture. Fifth, the testimony presented at the hearing on Appellant's motion to suppress (or his omnibus pretrial motion seeking suppression) in CR-1473-2016 established that the Commonwealth instituted proceedings for the issuance of process in that the Commonwealth applied for and received warrants to search the phones.

In his twelfth issue, Appellant asserts:

The Trial Court erred when it failed to provide notification to the Appellant that the previously filed 'Petition for Return of Property,' which by the Court standings would have been timely filed was denied. At which time the Appellant could have refiled. The Docket was removed from the UJS Portal and at this time the Appellant was incarcerated at the Lycoming County Prison with no Court access but by mail and was provided no notice.

The court cannot agree.

By way of background, on September 27, 2019, the court received from Appellant two petitions of BEZ WINDOW CLEANING, LLC, by its member Appellant, to return two iPhone 6S Plus cellular phones in case 1473-2016 and to return an iPhone 8S cellular telephone in case 742-2008. The envelope in which the petitions arrived was postmarked September 24, 2019, and contained the name of another inmate at the Lycoming County Prison in the return address. In an Order dated October 7, 2019 and file stamped October 8, 2019, the court summarily dismissed the petitions. The court noted that LLC entities may not proceed in the Pennsylvania courts of common pleas except through a

³ Former section 6801(c) stated: "In the event seizure without process occurs, as provided herein, proceedings for the issuance thereof shall be instituted forthwith."

licensed attorney,⁴ and Appellant was not a licensed attorney. Therefore, Appellant's representation of BEZ was impermissible. The court included Appellant in the distribution list.

There is nothing in the record to establish that Appellant did not receive notice of this order. Rather, the only specific orders that Appellant asserted on the record that he did not receive were the order scheduling argument on his motion in 1020-2019 for February 5, 2021 and the order continuing the argument on Appellant's motions from December 8, 2020. Transcript, 02/05/2021, at 3, 5-6.

In any event, Appellant could not have simply refiled because the motion sent to the court in September 2019 was also untimely. The court granted Appellant's motion to dismiss pursuant to Rule 600 on May 8, 2019. The Commonwealth filed a motion for reconsideration, which the court denied on May 30, 2019. Therefore, pursuant to *Allen*, Appellant had to file his motion for return of property in case CR-1463-2016 on or before July 1, 2019.⁵

Appellant next asserts that the trial court erred by not providing him with

⁴ *David R. Nicholson, LLC v. Jablonski*, 163 A.3d 1048 (Pa. Super. 2017).

⁵ June 30, 2019 was a Sunday. Therefore, Appellant would have had until the following business day, Monday, July 1, 2019 to file a timely motion for return of property.

adequate notice of the rescheduled hearing as afforded by both the Pennsylvania Constitution Article 1, §9 and the 6th and 14th Amendments of the United States Constitution in order for the Appellant to be able to adequately subpoena the original Prosecuting Attorney, County Detective and Defense Counsel involved in original plea negotiations.⁶ This issue appears to relate solely to case CR-1020-2019.

Appellant waived this issue by failing to assert it properly before the trial court. Pa.R.A.P. 302. Although Appellant mentioned that he did not become aware that the motion for return of property in 1020-2019 was scheduled for February 5, 2021 until the end of the previous week, he never asked for a continuance, notified the court that he wished to call any witnesses, or requested any other relief. The court explained to Appellant that it did not control the Clerk of Courts, the Department of Corrections or the mail, but to the extent Appellant wished to ask for a continuance or ask for relief, the court could address that. Appellant never asked for any relief.

In his fourteenth issue, Appellant asserts the following:

The Trial Court erred by violating Constitutional rights afforded to the Appellant by failing to provide adequate notice to the Appellant of any time limitations of filing a “Return of Property Petition” within (30) days. Nor did the Court provide Notice that any Post Sentence Motions had to be filed within (30) days, or the Court only maintained jurisdiction for (30) days after sentencing. Such time guidelines are not established within the sentencing records nor was notice given that a “Return of Property” Petition would be required. Timeliness of a reconsideration or appeal was the only established time guidelines. The Courts never instructed the Appellant of a need to file for the return of property or the Commonwealth to file for forfeiture of property. This due process violation violates both the Pennsylvania Constitution Article 1 §9 and the 6th and 14th Amendments to the United States Constitution.

As with many of Appellant’s other claims, Appellant waived this claim by

⁶ The court assumes Appellant is referring to former assistant district attorney Lee Fry, Detective Calvin Irvin,

failing to assert it when he was before the trial court. Pa.R.A.P. 302. At the time the charges were dismissed in 1473-2016, Appellant was represented by counsel. It was counsel's job to advise Appellant, not the court. In 1020-2019, Appellant chose to represent himself. The court warned him that he would be required to follow the law even though he lacked formal legal training and his failure to do so could result in issues being forever waived or lost. The law is not limited to procedural rules, but also includes case law, statutes, and regulations. With respect to 1473-2016, Appellant had months to prepare for the argument on the timeliness issue. The Commonwealth filed its answer and new matter on October 8, 2020. Appellant had approximately four months to evaluate the *Allen* decision and raise any arguments or issues (constitutional or otherwise) that he wished when he was before the court on February 5, 2021. Although Appellant did not file his petition for return of property until December 2020 in case 1020-2019, the timeliness issue was the same in both cases.

Appellant next asserts that the trial court erred as it had an obligation to restore the status of property "Quo Ante", and should have required the Commonwealth to create a sufficient nexus between the criminal activities and the seized property while appropriately applying the rules of evidence and not entertaining hearsay. There would be a Constitutional problem if the Rules allowed the Commonwealth to seize property as it wills and not file a timely Forfeiture Petition and prove any wrongdoing. Appellant did not raise this issue in the trial court; therefore, it is waived. Pa.R.A.P. 302. The court did not order forfeiture. Therefore, the Commonwealth was not required to establish a nexus. Moreover, at least with respect to 1020-2019, Appellant's guilty plea to two counts of invasion of privacy,

and Appellant's standby counsel, Helen Stolin as Appellant was representing himself at the time of his guilty plea and sentencing.

which arose out of Appellant's use of an electronic device to videotape women in a department store fitting rooms, established a nexus between the criminal activities and his electronic devices.

Appellant also contends the trial court erred in not reinstating his rights nunc pro tunc as he was represented by counsel who had a duty to either file a timely motion for return or notify Appellant of any time restraints during their representation. Appellant contends that counsel's ineffectiveness should not rest on his shoulders where he is subjected to the loss of personal property. If Appellant had filed such petitions, the court would have been required to deny them pursuant to Pa.R.Cr.P. 576 as petitions submitted while represented by counsel are considered hybrid and shall not be entertained by the court.

Appellant waived this issue. Appellant never requested reinstatement of his right to file a petition for return of property nunc pro tunc. Furthermore, Appellant represented himself in case 1020-2019 and could have filed a timely motion for return of property on his own.

Appellant's final issue is that the trial court erred by allowing the Commonwealth to violate rights afforded by both the Pennsylvania Constitution Article 1 §9 and the 5th, 8th and 14th Amendments of the United States Constitution when the Commonwealth deprived Appellant of his personal property without providing adequate compensation for his property. Appellant waived this issue by failing to assert it before the trial court.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Colin J. Best, QC-0994
SCI Somerset, 1590 Walters Mill Rd, Somerset PA 15510
Judge Marc F. Lovecchio
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)